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No. 88-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.

Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. Introduction

Respondents concede that the issue before the Court — whether jurisdiction over civil claims brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, resides exclusively in the federal courts — is controlled by the analytical framework established by this Court in *Claflin v. Houseman*, 93 U.S. 130 (1876) and most recently reaffirmed in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). While Respondents quote the language of the *Gulf Offshore* test, however, they do not apply that

test but instead alter both its terms and its application in order to sustain their position that RICO is within the concurrent jurisdiction of the state courts. That attempt to alter over one hundred years of the Court's jurisprudence should be rejected.[1]

II. A Proper Analysis Of RICO's Legislative History Demonstrates The Requisite Congressional Intent That RICO Jurisdiction Should Be Exclusively Federal.

In *Gulf Offshore,* the Court described the operative analytical methodology for determining whether the federal courts have exclusive jurisdiction over a civil action created by Congress as follows:

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts *either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.*

453 U.S. at 478 (emphasis added) (citations omitted).

The legislative history of RICO creates an unmistakable implication that jurisdiction over civil actions brought under it is exclusively federal. As demonstrated in Petitioners' Brief ("Pet. Br."), the legislative history of RICO and the decisions of this Court establish that

1. Since the filing of Petitioners' Brief, the Court of Appeals for the Third Circuit, in *McCarter v. Mitcham,* No. 88-3654 (3d Cir. August 16, 1989) held, with minimal discussion, that jurisdiction over RICO is concurrent. Judge Sloviter concurred in the result but filed a lengthy dissenting opinion on the RICO jurisdiction issue. *See McCarter,* slip op. at 21-28.

when Congress enacted the civil provisions of the statute, it expressly modeled those provisions upon the Clayton Act. *See Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985). Civil actions brought under section 4 of the Clayton Act, 15 U.S.C. § 15(a), have long been held to be within the exclusive jurisdiction of the federal courts, and Congress, when enacting RICO, must be presumed to have known of those decisions and to have intended that section 1964(c) of RICO would be interpreted in the same fashion as section 4 of the Clayton Act with respect to the issue of exclusive jurisdiction. (*See* Pet. Br. at 25-28.)

Respondents, in their Brief ("Resp. Br."), attempt to avoid the force of the extensive and indisputable legislative history of RICO[2] by proffering what can only be described as a novel standard, not rooted in *Claflin* and *Gulf Offshore,* and unsupported by any case law, for determining whether jurisdiction over civil RICO claims is exclusively federal. In Respondents' view, only an express provision in the statutory language providing for exclusive jurisdiction would be sufficient to confer exclusive jurisdiction on the federal courts. They argue that exclusive jurisdiction requires "an *affirmative act* of Congress," – that is, an "explicit statutory directive." (Resp. Br. at 7, 17) (emphasis added). *(See also* Resp. Br. at 15, 19, 21 n.12, 23.)

2. Respondents also argue that the Court should not consider Congress' reliance upon the Clayton Act in deciding the RICO jurisdiction issue because, according to Respondents, this Court's longstanding holding that jurisdiction over the antitrust laws is exclusively federal is suspect. (*See* Resp. Br. at 24-25.) Even if Respondents were correct in their view, however, the issue whether the antitrust laws *should* be subject to exclusive federal jurisdiction is irrelevant to the issue before this Court. The relevant point here is that, at the time RICO was enacted, the Clayton Act had long been held to provide for exclusive federal jurisdiction, and Congress must be presumed to have been aware of those decisions when it modeled RICO upon the Clayton Act.

This suggested "test" is unsupported by the holdings and language of *Gulf Offshore, Claflin,* and *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). Each of those cases squarely held that Congress could by *implication* create exclusive federal jurisdiction, and in *Gulf Offshore* and *Charles Dowd* the Court analyzed the legislative history for the purpose of determining whether Congress had by implication conferred exclusive jurisdiction in the federal courts over the federal statutes at issue in those cases. Accordingly, Respondents' proposed standard for determining exclusive jurisdiction should be rejected.

While proffering this new and unprecedented test for determining exclusive jurisdiction, Respondents reluctantly acknowledge in passing that this Court's decisions require a finding of exclusive federal jurisdiction if the legislative history of a federal statute supports an implication of exclusive federal jurisdiction.[3] They contend, however, that RICO's legislative history is "silent". (Resp. Br. at 19.) This contention ignores the extensive Congressional record surrounding RICO's enactment, which is replete with considered references to the Clayton Act evidencing the conscious and explicit intent of Congress to model RICO's remedial mechanisms upon the antitrust laws. It is that very modeling which demonstrates a clear implication of exclusive federal jurisdiction.[4]

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3. Respondents, however, contend that this Court has merely "allowed" that exclusive jurisdiction may be shown by an unmistakable implication arising from the legislative history, and imply that this "allowance", which is at odds with Respondents' view of what the test for exclusivity *should* be, is somehow improper. (Resp. Br. at 17.) On the contrary, however, as set forth in Petitioners' Brief at 12-19, this Court's decisions relating to the issue of exclusive jurisdiction reflect a considered application of constitutional principles and two hundred years of precedent dating back to the writings of Alexander Hamilton. *See* The Federalist No. 82.

4. Respondents' contention that the legislative history of RICO is "silent" is based solely, it would appear, on Professor G. Robert Blakey's comment that, to his knowledge, "no one [in Congress] even thought of the issue" of concurrent jurisdiction. (Resp. Br. at 18 (citing Flaherty, *Two States Lay Claim to RICO,* Nat. L.J., May 7, 1984, at 3, col. 2).) Respondents, however, give credence to Professor Blakey only when his comments appear to support their position, since they deprecate his comments in support of exclusive jurisdiction. (Resp. Br. at 18 n.11.) In any event, Professor Blakey's views, while academically interesting, are not relevant to the point now before the Court. What is pertinent is that, as demonstrated in Petitioners' Brief, *Congress* modeled RICO on the Clayton Act and that Act has been held to be within the exclusive jurisdiction of the federal courts.

Finally, Respondents contend that this Court's explication of the analogy between RICO and the Clayton Act is irrelevant to this case because *Malley-Duff* involved the proper exercise of this Court's authority to interpret statutes, while the instant case, according to Respondents, does not, since it involves something other than statutory interpretation. (Resp. Br. at 22-23.) This assertion is simply wrong. Consistent with the *Gulf Offshore* test, the instant case only requires, as did *Malley-Duff* and *Sedima*, the judicial construction and interpretation of RICO based upon Congressional intent and legislative history "within the general framework of familiar legal principles." *Malley-Duff,* 483 U.S. at 147 (quoting *DelCostello v. Teamsters,* 462 U.S. 151, 158-59 (1983)).[5]

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5. Respondents' related assertion that a finding of exclusive jurisdiction under RICO would "intrude upon the prerogative of the various state legislatures to define the jurisdiction of their own courts" (Resp. Br. at 23) rests on two false premises: first, that the judicial construction of RICO constitutes anything other than the traditional exercise of the Court's authority to construe and interpret statutes; and, second, that the state legislatures have any "prerogative" to confer jurisdiction over federal statutes upon their courts when the statutes meet one of the *Gulf Offshore* tests.

III. Petitioners Have Demonstrated That RICO Is Incompatible With Concurrent State-Court Jurisdiction Under The *Gulf Offshore* Test.

A. *The Appropriate Test For Incompatibility*

In *Gulf Offshore,* this Court held that federal courts have exclusive jurisdiction over federal claims when there is a "clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore,* 453 U.S. at 478. Accordingly, the Court explicitly considered whether the "operation" of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.,* would be "frustrated" by concurrent state-court jurisdiction over state-law tort and contract actions brought under the statute, 453 U.S. at 483, and enumerated some of the factors to be evaluated in making such a determination, stating:

> The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

453 U.S. at 483-84 (footnote omitted).

Thus, the issue now before the Court, as clearly defined in *Gulf Offshore,* is whether the structure and purposes of RICO are incompatible with, or would be frustrated by, state-court jurisdiction over civil RICO claims.[6] As Petitioners have previously explained (Pet. Br. at 28-37), application of this facet of the *Gulf Offshore* test also requires a finding of exclusive federal-court jurisdiction.

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6. Similarly, in *Claflin,* the Court noted that jurisdiction is exclusively federal when there is an "incompatibility in [the] exercise [of state-court jurisdiction] arising from the nature of the particular case," 93 U.S. at 136, language quoted by the Court in *Charles Dowd,* 368 U.S. at 508.

Respondents' view of the incompatibility test is strained and exceedingly narrow. They assert that incompatibility can only exist where the claim at issue is asserted against the federal government or its officers or instrumentalities,[7] or when Congress "specially constitute[s] or ordain[s] some judicial or administrative tribunal to ensure the development of a uniform or expert jurisprudence." (Resp. Br. at 28-31.)

Respondents' argument not only is devoid of support in the law, but is refuted by the express language of *Gulf Offshore* and over a century of case precedent, none of which even suggests such a strained and selective definition of "incompatibility." Rather, this Court's cases provide in more general and logical terms that the type of incompatibility required to render federal jurisdiction exclusive is that which would frustrate the effective operation of the federal statutory scheme. As noted above, although the two factors listed by Respondents plainly would tend to show incompatibility, the Court in *Gulf Offshore* considered several other factors which could lead to a finding of incompatibility. Moreover, there is no suggestion in *Gulf Offshore* that even the list of factors set forth there is all-inclusive.

Additionally, Respondents attempt to paint this Court's analysis of factors relevant to the incompatibility issue in *Gulf Offshore* as an example of potential "creative judicial lawmaking," implying that the Court's analysis was either inappropriate or unnecessary.[8]

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7. Respondents cite only *Ableman v. Booth,* 21 How. (62 U.S.) 506 (1859) and *United States v. Tarble,* 13 Wall. (80 U.S.) 397 (1872) in support of this argument. *Ableman* and *Tarble,* however, are not exclusive jurisdiction cases, but rather deal with limitations on the power of state courts to compel the federal government's compliance with state-court orders.

8. Petitioners, in their Brief, cited a law review article in support of their explication of Alexander Hamilton's view of the concurrent jurisdiction of state courts. (Pet. Br. at 13) (citing Redish and Muench, *Adjudication of Federal Causes of Action in*

(Resp. Br. at 32-33.) The Court's enumeration of relevant factors, however, was not *dictum* as suggested by Respondents, but constituted a substantive part of the *Gulf Offshore* incompatibility analysis. *See Gulf Offshore,* 453 U.S. at 483-84 (citing Redish and Muench, 75 Mich. L. Rev. at 329-35). Thus, contrary to Respondents' repeated attempts to limit the concept of "incompatibility" as expounded by this Court, the test for incompatibility set forth in *Gulf Offshore* should control this case.

B. *Application Of The Gulf Offshore Test For Incompatibility*

Petitioners demonstrated in their Brief that RICO is incompatible with concurrent state-court jurisdiction because federal criminal statutes, which are subject to exclusive federal jurisdiction pursuant to 18 U.S.C. § 3231, must remain under the exclusive purview of the federal courts; because of the need for uniformity and consistency in the interpretation of RICO; and because RICO's procedural mechanisms are incompatible with concurrent state-court jurisdiction. Respondents' arguments in opposition fail to refute any of these points. Petitioners will not reargue all of the points raised in our first Brief but will only address several specific points raised by Respondents.

NOTES *(Continued)*

State Court, 75 Mich. L. Rev. 311, 314 (1976)) (hereinafter "Redish and Muench"). Respondents, however, incorrectly imply that Petitioners cited the Redish and Muench article for a wholly different reason – to urge this Court to engage in "creative judicial lawmaking" when applying the incompatibility prong of the *Gulf Offshore* test. (Resp. Br. at 32.) Petitioners did not advance such an argument in their Brief, and do not do so here. The *Gulf Offshore* test, this Court's benchmark for determining exclusive jurisdiction issues, establishes that jurisdiction over civil RICO actions is exclusively federal. Accordingly, Respondents' opposition to an argument that Petitioners did not make is irrelevant, and should be disregarded.

1. *The Need For Uniformity*

Respondents argue that, since Congress did not expressly include a provision in RICO to insure uniformity, such as creating specialized tribunals or limiting jurisdiction to specific courts, there is no "evidence" that Congress intended to insure uniformity in the construction and application of RICO. (Resp. Br. at 33.) When analyzed, however, the contention that there is no "evidence" of Congressional concern with uniformity is simply a variation on Respondents' theme expressed throughout their Brief that nothing less than an explicit statutory directive can form the basis for a finding of exclusive jurisdiction. To the contrary, the Court in *Gulf Offshore* expressly listed uniformity as one of the factors to be considered in addressing the incompatibility issue and nowhere limited consideration of that issue to the presence or absence of an explicit statutory directive. *See also Claflin,* which refers generally to "incompatibility . . . arising from the nature of the particular case." 93 U.S. at 136.

Next, Respondents argue that the need for uniformity "is particularly weak with respect to RICO," asserting that RICO merely attaches criminal penalties and civil liabilities to conduct that is "already criminal." (Resp. Br. at 34.) That position completely misapprehends the scope of RICO, which attaches such penalties and liabilities, not to conduct that is "already criminal", but *only* to conduct that constitutes a *pattern* of racketeering activity in interstate commerce – an entirely new and uniquely complex federal crime.[9] Moreover, as Petitioners have previously explained (Pet. Br. at 29-33),

9. Similarly, Respondents' argument that "diversities and conflicts" in RICO jurisprudence may be desirable (Resp. Br. at 35) also ignores the need for uniformity and consistency in the orderly development and application of the federal criminal laws. *See H.J. Inc. v. Northwestern Bell Telephone Co.,* 109 S. Ct. 2893, 2908-09 (1989) (Scalia, J., concurring).

uniformity is particularly important because of the need to maintain consistency in the development and application of the federal criminal laws, which comprise most of RICO's predicate offenses.[10]

2. *"Little RICO" Acts*

Respondents also argue that, since some states have "little RICO" laws that incorporate federal predicate acts in their definitions of "racketeering activity", state judges must be presumed to be familiar with the construction of RICO's federal predicate acts. (Resp. Br. at 37 (citing N.J. Stat. Ann. § 2C:41-1a(2); Ohio Rev. Code Ann. § 2923.31(I)(1)).) This argument, however, misses the point. Petitioners have not taken and do not now take the position that state court judges are unable to render decisions competently as to matters arising under RICO. Rather, the opening of state courts to RICO cases would lead to uncertainty in the law under RICO, as well as in the underlying federal criminal laws, because thousands of state trial court judges, scores of intermediate state appellate courts, and fifty state appellate courts of last resort would be permitted to render decisions on RICO. Accordingly, although all courts would be subject to the guidance of this Court in construing the statute, the Congressional command that

10. Respondents also argue that there is "no inherent inconsistency between [sic] state-court jurisdiction over federal civil actions that have federal criminal counterparts." (Resp. Br. at 36 n.25 (citing 42 U.S.C. §§ 1983 and 1988, and 18 U.S.C. § 242).) However, RICO is the only federal statute that incorporates by reference, and includes as part of its substantive civil provisions, a wide range of federal crimes over which Congress did not intend to vest jurisdiction in the state courts. Moreover, with respect to 42 U.S.C. §§ 1983 and 1988, this Court has found an express Congressional intent that jurisdiction over the Civil Rights Act be concurrent. (*See* Pet. Br. at 19 n.13.) No such finding can be made with respect to RICO.

the development and interpretation of the federal criminal laws be vested exclusively in the federal courts would be eviscerated. *See* 18 U.S.C. § 3231; *see also* Pet. Br. at 32-33.

In addition, as Judge Sloviter pointed out in her dissent in *McCarter:*

> [i]n this situation of flourishing state experimentation in the development of anti-rackteering initiatives, it seems . . . that the "diversities and conflicts" which are a beneficial aspect of our federal system and its general rule of concurrent jurisdiction . . . are best prompted by leaving the state courts free to focus on the interpretation and application of their own anti-racketeering laws and confining jurisdiction over the federal statute to the federal courts in keeping with the clear implications in RICO's legislative history.

McCarter, slip op. at 27-28 (Sloviter, J., concurring in part, dissenting in part, and concurring in the judgment).

3. *Arbitrability Of RICO Claims*

Additionally, Respondents argue that because this Court has upheld agreements to arbitrate when claims are based upon RICO, and upon other statutes that indisputably confer exclusive federal-court jurisdiction, there is no inconsistency between state-court jurisdiction and RICO. (Resp. Br. at 27 and n.21, 36-37) (citing *Shearson/American Express, Inc. v. McMahon,* 107 S. Ct. 2332 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985)). This argument is incorrect.

First, and most important, the Court's analyses and decisions in both *McMahon* and *Mitsubishi* were grounded upon the strong federal policy favoring the enforcement of arbitration *agreements. See McMahon,* 107 S. Ct. at 2337; *Mitsubishi,* 473 U.S. at 625-26.

Thus, in each case, the fundamental premise necessary to the result reached by the Court was that the parties had *agreed* in the first place to waive the judicial remedies available under the statutes in question. To overcome their freely made contracts to arbitrate, the plaintiffs in each case were required to demonstrate "that Congress intended to make an exception to the Arbitration Act . . . , an intention discernible from the text, history, or purposes of the statute." *McMahon,* 107 S. Ct. at 2338; *see also Mitsubishi,* 473 U.S. at 628-29. The current case, however, presents a fundamentally different situation: Petitioners made no agreement in which they waived their rights to a federal forum.

Second, Respondents concede that other statutes over which federal courts have exclusive jurisdiction have been held to be subject to arbitration. (Resp. Br. at 27 n.21.) This concession demonstrates conclusively that neither this Court nor Congress has found any inconsistency in subjecting exclusively federal claims to arbitration when the parties have expressly agreed to waive their rights to the federal judicial forum. Accordingly, the decisions in *McMahon* and *Mitsubishi* are not pertinent to the instant case.

4. *Procedural Incompatibility*

Respondents also dispute Petitioners' showing that RICO's procedural mechanisms are incompatible with concurrent state-court jurisdiction by arguing that "the states generally retain the authority to promulgate procedural rules for their courts even where the right being asserted derives from federal law." (Resp. Br. at 38.) This argument, however, ignores RICO's broad procedural mechanisms, which are necessary to implement the purposes and objectives of the statutory scheme. These mechanisms are *not* available in state courts, and the states have no power to enact such extensive procedures. *(See* Pet. Br. at 36-37.)

Respondents point to the fact that the right to attorneys' fees provided by 42 U.S.C. § 1988 may be enforced in state courts even though section 1988 contains "specific procedures for the conduct of federal court proceedings." (Resp. Br. at 39.) This argument is without merit, since section 1988, unlike RICO, does not provide expansive procedural mechanisms which are unavailable to enforce the provisions of the statute in state courts. In any event, section 1988 is an adjunct to section 1983, as to which this Court has found a Congressional intent that jurisdiction be concurrent. *See* note 10 *supra.*

Respondents also cite section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to support their position that the procedural mechanisms of RICO do not point to a finding of exclusive jurisdiction. That statute was analyzed by this Court in *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), and allegedly contains "enforcement and venue provisions similar to those in RICO." (Resp. Br. at 38.) A simple comparison of section 301 with section 1965 of RICO, however, reveals the plainly erroneous nature of such a contention. The provisions of section 301 which Respondents contend to be similar to those in RICO are limited, and include nothing like the extensive service of process provisions of sections 1965(b), (c) and (d) of RICO.

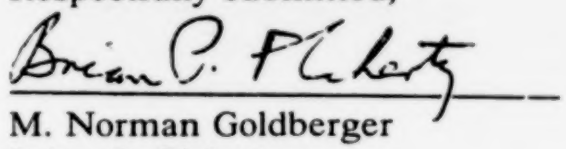
5. *Deprivation Of Petitioners' Federal Forum*

Finally, Respondents argue that "in the ordinary case, neither party will even [sic?] be deprived of the right to choose the *federal* forum if he so wishes." (Resp. Br. at 39) (emphasis in Resp. Br.). As Respondents concede, however, in the instant case Petitioners *have* been foreclosed from pursuing their federal claims in a federal court, contrary to their express choice.

CONCLUSION

For the reasons set forth herein and in the Brief for Petitioners, this Court should reverse the decision of the Court of Appeals, order the Amended Complaints reinstated, and remand the matter for further proceedings consistent with its opinion.

Respectfully submitted,



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